PP

v.

ISMAIL SHAH ABDUL WAHAB

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR JC
[CRIMINAL APPEAL NO: 42-55-2007]
6 NOVEMBER 2007

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Whether sentence should be disturbed by appellate court - Whether sentence not passed according to law - Section 173(m)(2) of the Criminal Procedure Code - Whether sentencing judge had embarked on some unauthorized or extraneous or irrelevant exercise of discretion*

CRIMINAL PROCEDURE: *Sentence - Plea of guilty - Sexual offences - Accused having a string of previous convictions for offences of similar nature - Plea of guilty did not count for much - Public interest demanded long custodial sentence*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Whether sentences passed for present offence to run concurrently with sentences passed for earlier offences - Offences not committed in one transaction - No proximity of time, place, action, purpose or design - Sentences to run concurrently*

In 2004 the appellant had forced a schoolgirl aged 15 years and 2 months to do oral sex on him before he proceeded to rape her. This crime took place in Ampang Jaya. Nothing much happened in the investigations into the girl's report, until the police arrested the appellant in 2006, for having committed similar offences in the Kuala Lumpur area (the "KL offences"). The appellant was charged on one count of rape under s. 376 Penal Code and on another count under s. 377C of the same Code. The appellant pleaded guilty to the said charges. The learned Sessions Court Judge then sentenced him to ten years imprisonment and 4 strokes of the rotan for the offence under s. 377C and 20 years imprisonment and 6 strokes of the rotan for the offence of rape under s. 376. The learned judge ordered the said sentences to run concurrently, but to take effect after he had completed serving his current sentences for the KL offences. The appellant appealed claiming that the sentences were excessive. The appellant also requested that his sentences be ordered to be effective on the same date as his sentences passed earlier on him for the KL offences. The appellant had 10 previous convictions which related to 3 rape charges, 2 charges under s. 377C of the Penal Code, 1 charge under s. 377B of the Penal Code and 1 charge under s. 342 of the Penal Code. He was also convicted for 3 offences, each under ss. 363, 354 and 392 of the Penal Code.

Held (dismissing the appeal and affirming the sentences in their entirety):

(1) To disturb a sentence, it must be shown to the appellate court that the impugned sentence was one that was not passed according to law as envisaged under s. 173(m)(2) of the Criminal Procedure Code. (para 6)

(2) The appellant had a string of previous convictions for offences of similar nature he had committed. There must exist extenuating circumstances to such a degree as to justify the exemption of the imposition of an otherwise deterrent sentence on the offender. The onus to show that his situation merited such consideration in his favour must reside with the offender. A deterrent sentence was indeed very much in order. (para 7)

(3) A sentence passed by a lower court can only be dislodged upon convincing proof by the aggrieved party that the sentencing judge had embarked on "some unauthorized or extraneous or irrelevant exercise of discretion" before coming up with the sentence. (para 9)

(4) The appellant's plea of guilty did not count for much. Public interest demanded that the appellant be kept away in prison for a long time. (para 10)

(5) The appellant's plea that his sentences be ordered to be effective on the same date as his sentences passed earlier on him for the KL offences must be rejected. The offences he had committed for which he was sentenced in this case were not committed in the one transaction relating to the KL offences. For there to be one transaction, four elements must be present namely, proximity of time, proximity of place, proximity of action and proximity of purpose or design. (para 12)

Case(s) referred to:

Amran Jin v. PP [2007] 2 CLJ 545 HC ***(refd)***
Amrita Lai Hazra v. Emperor, 42 Cal 957 ***(refd)***
Annantan Subramaniam v. PP [2007] 8 CLJ 1 HC ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Safian Abdullah & Anor [1983] CLJ 804 HC ***(refd)***
R v. Billam [1986] 1 All ER 985 ***(refd)***
Ramnarain v. State of Uttar Pradesh AIR [1973] SC 2200 ***(refd)***
Safae Ing v. PP [2006] 6 CLJ 125 HC ***(refd)***
Vitos v. R [1981] 4 A Crim R 238 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(m)(2)
Penal Code, ss. 342, 376, 377B, 377C

For the appellant - In person
For the prosecution - Alfred Egin; DPP

Reported by Amutha Suppayah

JUDGMENT

Abang Iskandar JC:

[1] On 19 August, 2004, at about 4.30 in the evening, a schoolgirl aged 15 years and 2 months, was walking home alone from her school in Ampang Jaya. A car then pulled up by her side and the driver of the car asked her for direction to go to the mosque. He then forced her to get into his car to guide him to the mosque. Once she got into his car, the driver took out what appeared like a screw-driver and threatened her with bodily harm unless she performed sex on him. She was very frightened as a result thereof. He then drove his car to a nearby bushy area, took her out of the car, forced her to undress and forced her to do oral sex on him before he proceeded to rape her. Having satisfied his lust, he left her there to fend for herself. She picked herself up, walked to the nearby police station and there she lodged a police report on the incident. A medical examination was performed on the victim and it was revealed that there were a few tears at the hymen which were observed at positions 1, 4 and 8 o'clock.

[2] Nothing much happened in the investigations into the girl's report, until the police arrested a man on 9 August 2006, for having committed similar offences in the Kuala Lumpur area (the "KL offences") as well as in Ampang area. As a result of the ensuing investigations, the man was determined as the driver of the car who had on 19 August 2004 committed sexual assault offences on the hapless schoolgirl in Ampang Jaya. He was accordingly charged before the learned Sessions Court Judge ("SCJ") sitting at Ampang, on one count of rape under s. 376 Penal Code and on another count under s. 377C of the same Code. Though he had earlier on contested the charges, he subsequently pleaded guilty to the said charges. The learned SCJ, having convicted him on both charges and having heard the pleas in mitigation and the submissions by both parties proceeded to sentence him to ten years imprisonment and four strokes of the rotan for the offence under s. 377C of the Penal Code and 20 years imprisonment and six strokes of the rotan for the offence of rape under s. 376 of the same Code.

A The learned SCJ sitting at Ampang ordered the said sentences to run concurrently, but to take effect after he had completed serving his current sentences for the KL offences.

[3] The driver of the said car is the appellant in this case and his name is Ismail Shah bin Abdul Wahab. He was aggrieved by the B sentences imposed on him by the learned SCJ sitting at Ampang, complaining on appeal before me that they were excessive. Despite being given a few opportunities to engage legal counsel, he had failed to secure one and finally he had prosecuted his own appeal before me. He informed this court that he had repented, that he had a child and a wife C and that he had elderly parents to take care of. He also requested that these sentences be made to run concurrently with the sentences imposed on him for the KL offences. He had urged this court to dispense justice to him. The prosecution did not file in any cross appeal but before this court, the learned Deputy urged me not to disturb the sentences D imposed, as the learned SCJ sitting at Ampang had not erred in coming up with her sentences.

[4] After considering the respective submissions, I had dismissed the appeal. Ismail Shah was aggrieved by my ruling and had since filed in his notice of appeal. I am now setting out the reasons as to why his E appeal before me could not succeed.

[5] At the outset, it must be said that sentencing is one of the most under-rated of any court's processes. If truth be told, although it may appear to be a mundane and routine exercise, it is one of the most F challenging tasks that a judge has to face because, he or she is then faced directly with another human being whose future liberty is entirely dependent on how he or she exercises the judicial discretion when deciding on the form of sentence to be imposed. True, there are established principles to be considered but suffice to say that a sentence G that is passed is not exactly what Mr. Newton would readily describe as an "equal reaction" to a prior action. Very rarely could a sentence encapsulate, in exact quantum, a punishment that befits a crime that has been committed. The fact that Parliament in its wisdom always leaves it to the court to exercise its discretion in meting out a sentence by giving H it a range of punishment within which to act, depending on the circumstances of each case, is testimony to this inherent difficulty. The learned judges of the Supreme Court in India, in the case of *Ramnarain v. State of Uttar Pradesh* AIR [1973] SC 2200, have this to say on sentencing: "The question of sentence is always a matter of some difficulty. It generally poses a complex problem which requires a working I compromise between the competing views based on reformative, deterrent and retributive theories of punishments. Though a large number of factors fall for consideration in determining the appropriate sentence,

the broad object of punishment of an accused person found guilty in a progressive society is to impress on the guilty party that the commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence, to be appropriate should, therefore, be neither too harsh nor too lenient." Indeed, Wan Yahya J (as he then was) had described sentencing as "a complex and discerning process which depends not on the use of a common mathematical yardstick" in the case of *PP v. Safian Abdullah and Anor* [1983] CLJ 804. Quite clearly brought out in those quotes is the challenge of coming up with the appropriate sentence in a given circumstance and while sentencing is not exactly rocket science, neither can it be aptly likened to a mere walk in the park.

[6] A sentence that has been passed would stand until varied or reversed by a higher court. But to disturb a sentence, it must be shown to the appellate court that the impugned sentence was one that was not passed according to law as envisaged under s. 173(m)(2) of the Criminal Procedure Code. In the case of *PP v. Jafa bin Daud* [1981] 1 LNS 28, Mohamed Azmi J (as he then was) had said "A 'sentence according to law' means that a sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that in passing sentence, a magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences committed previously were of similar nature as the one with which he is presently charged. The court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. *Where he is found to be a persistent offender for similar type of offences, then it is in the interest of justice that a deterrent sentence should be passed and, in such a case, unless there are exceptional circumstances, the quantity, nature or value of the subject-matter of the offence with which he is currently charged can very rarely constitute a mitigating factor.*" (emphasis added).

[7] Looking at the sentences passed by the learned SCJ sitting in Klang, has she acted in the manner expected of her by the 'ratio' as enumerated by *Jafa bin Daud*'s case. I had had no hesitation in saying that she had adhered to the established principles. This appellant had a string of previous convictions for offences of similar nature committed by him in the Kuala Lumpur area as well as Petaling Jaya area, as was evident at pp. 23 of the record of appeal. The learned judge in *Jafa bin Daud*'s case did not elaborate on what was meant by "exceptional

A circumstances", but to my mind, it meant that there must be the existence of extenuating circumstances to such a degree as to justify the exemption of the imposition of an otherwise deterrent sentence on the offender. It was my view too that the onus to show that his situation merited such consideration in his favour must reside with the offender.
B In this case, the learned SCJ sitting at Ampang had considered the fact that this appellant was a repeat offender and there was nothing in his mitigation that could be considered as being "exceptional" so as to be dealt with a less than deterrent sentence. Under the circumstances, I had agreed with the manner that she had taken to sentence this appellant,
C whereby a deterrent sentence was indeed very much in order.

[8] Having determined that a deterrent sentence was in order, the only question that remained to be answered would be the appropriateness of the length of the sentences imposed on this appellant for the two offences. If indeed they were manifestly excessive, as
D complained by this appellant, then that would be a valid ground for me to disturb them and to tamper them accordingly.

[9] However, before I started doing what this appellant had urged me to do, I had reminded myself of the words of Raja Azlan Shah Ag LP
E (as His Royal Highness then was) in the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, where His Lordship had said, "As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have the occasion to
F say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is different judges applying the same principles at the same time
G in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jameson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences, while other judges equally conscientious have thought it their duty to view the same crime with
H leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court had said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient,
I *per se*, to warrant this court's interference. **For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some**

unauthorized or extraneous or irrelevant exercise of discretion." (emphasis added) Those are clear words showing the degree of sanctity that had been bestowed upon a sentence passed by a lower court and that it can only be dislodged from its rightful place upon convincing proof by the aggrieved party that the sentencing judge had embarked on "some unauthorized or extraneous or irrelevant exercise of discretion" before coming up with sentence. Nothing short of that would suffice; not even the probability that another court would have imposed a different sentence would be a valid excuse to intervene.

[10] This appellant had pleaded guilty to both the charges preferred against him. The learned SCJ had taken that into account with all its probable positive implications that could work in his favour, but she had concluded that in the circumstances of the case before her, his plea of guilty could not and did not count for much. She had also alluded to his other submissions in his plea in mitigation. Then she had also considered the fact that this appellant had admitted to having committed several offences of similar nature and indeed had been punished on account of those offences. Based on that, she had ruled that public interest demanded that this appellant be kept away in prison for a long time so that he would not be a threat to the female population in the community where he lived. The record of previous convictions as admitted to by this appellant could be seen at p. 23 of the record of appeal. He had ten previous convictions which related to three rape charges, two charges under s. 377C of the Penal Code, 1 charge under s. 377B of the Penal Code and 1 charge under s. 342 of the Penal Code. He was also convicted on his own pleas of guilty in the Ampang Magistrate's Court for three offences, each under ss. 363, 354 and 392 of the Penal Code. For all these convictions in the courts below he was accordingly sentenced to various terms of imprisonment and to whippings. With that in mind, the learned SCJ sitting at Ampang had imposed the impugned sentences on this appellant. Was she wrong in her sentencing? Had she erred? Subjecting her sentences to scrutiny by applying the test laid down in *Bhandulananda*'s case, could they be described as being "so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description?" I was well aware of the fact that this appellant had a child and a wife and according to him the child needed a father and his wife needed him. I found myself to be extremely disturbed by his plea because I could not fathom how he could, in all probabilities, reasonably and effectively perform those functions, bearing in mind his propensity to commit heinous crimes. I did not believe that he was fit to lead a young family, let alone to care for his aged parents. This appellant is not a first offender but one whose past criminal record speaks volumes of his propensity to commit acts of perversion. To me, his plea therefore had sounded rather hollow and empty.

[11] From the facts of this case itself, deceit was exercised upon an innocent victim; a threat of bodily injury was carried out against a defenceless and unknowing schoolgirl who was later on brought into the bush, where she was then forced to perform oral sex on him, before he finally raped her. She must have thought earlier that this appellant was a pious person as he had asked her for direction to go to the mosque. Little did she know that this appellant was a wily fox wearing the proverbial sheep's costume. This appellant must have been emboldened in his sorties to satisfy his lusty pursuits until the long arm of the law caught up with him. Lord Lane, the learned Chief Justice of England in the case of *R v. Billam* [1986] 1 All ER 985 said; "the variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years." Where the offender represented a more than ordinary danger, **a sentence of 15 years or more** may be appropriate. Yet again, the learned Chief Justice had continued, and I quote: "Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder and where he is likely, if at large, to remain a danger to women for an indefinite time, **a life sentence will not be inappropriate**" [emphasis added] Looking at the offences committed by this appellant in this case and his past convictions, this appellant was indeed a rogue and a sex predator. He could be described as a clear and present danger. This appellant is not only a rapist but he is also a sex pervert and surely he needed to be put behind prison bars for a substantially long period of time. His past actions had come back to haunt him and to taunt him, and to my mind, rightly so. The Courts in our country have in recent years exhibited a very stern approach in the way they had dealt with cases of this nature. I need only to refer to a few of them such as *Annantan Subramaniam v. PP* [2007] 8 CLJ 1; *Amran bin Jin v. PP* [2007] 2 CLJ 545; *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 and *Safae Ing v. PP* [2006] 6 CLJ 125. Looking at the sentences imposed by the various courts cited above, I could not conclude that the learned SCJ sitting in Ampang had acted so far outside the normal discretionary limits as envisaged by Raja Azlan Ag LP in *Bhandulananda*'s case. I agreed with her that in a case such as this, coupled with a 'colourful past record', the pleas of guilty by this appellant entered in this case could not count for much. As such, I had ruled that the learned SCJ sitting at Ampang had not erred in her assessment of the appropriate sentences to be imposed on this appellant. Confronted with the kind of circumstances such as these, I could not think of any other forms of sentences which she could have come up with. On that score, I had agreed with the learned deputy that this appellant had failed to show how and where the learned SCJ had fallen into error in her handling of his case.

[12] There is another matter that was raised by this appellant during this appeal before me, which is that he had requested that his sentences concerned in this appeal be ordered to be effective on the same date as his sentences passed earlier on him for the KL offences. Now, the nett effect of these two sentences pertaining to this appeal in terms of imprisonment was that he would have to suffer jail time of up to 20 years as the two sentences imposed were ordered to run concurrently. But before he could begin to serve those sentences pertaining to this appeal, he would first have to serve jail time for previous sentences imposed on him for other similar offences. Without a doubt, this appellant would be spending a very long time in prison as a result of the cumulative aggregate of his numerous prison terms. I had considered this aspect of the appeal. However, I was not able to accede to his plea, on account that the offences he had committed for which he was sentenced in this case were not committed in the one transaction relating to the KL offences. For there to be one transaction, four elements must be present namely, proximity of time, proximity of place, proximity of action and proximity of purpose or design (see the case of *Amrita Lai Hazra v. Emperor*, 42 Cal 957). At the same time, I was very conscious that the totality of the terms of the sentences of imprisonment on him may have a 'crushing effect' on him. In the case of *Vitos v. R* [1981] 4 A Crim R 238, O'Bryan J was once faced with a similar predicament, but he had dealt with it admirably when he said; "It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour." The appellant before me had a criminal behaviour that more than fitted the profile of a sex pervert alluded to by Lord Lane in *Billam*'s case *(supra)*. As to his conduct surrounding the commission of these two offences immediately before me, I would like to quote Jeffrey Tan J, in the case of *Annantan Subramaniam v. PP* [2007] 8 CLJ 1, where His Lordship had said, "there was no extenuating circumstances. It was all evil intent". And was it not but Edmund Burke, the great Irish thinker, who had once said that, "in order for evil to succeed and triumph, good men and women need only do nothing." The sentences imposed by the learned SCJ sitting at Ampang on this appellant were not only meant to punish him, but it was equally and deliberately intended to be taken as a stern warning to those out there, that a very hefty sentence in every sense of the word awaits, and that it would be unleashed and visited in full force upon like offenders.

A **[13]** As such, the learned SCJ sitting at Ampang had not erred in point of legal principles when she sentenced this appellant the way she did. Her sentences therefore ought not to be disturbed and I had affirmed them in their entirety.

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